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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF CALIFORNIA and
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA
Petitioners,
VS.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 3, 1995

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QUESTION PRESENTED

May the Federal Communications Commission lawfully preempt state regulation applicable solely to the intrastate services of a local telephone company whenever the FCC believes that such state regulation is economically inefficient?

LIST OF PARTIES

Ad Hoc Telecommunications Users Committee
ADT Security Systems
American Telephone and Telegraph Company
Ameritech Corporation
Association of Telemessaging Services International
Bell Atlantic Corporation
Bell Atlantic Systems Leasing International, Inc.
Bell Atlantic Tricon Leasing Corporation
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corporation
Bell Atlantic Capital Funding Corporation
BellSouth Corporation
California Cable Television Association
Compuserve, Inc.
District of Columbia Public Service Commission
Federal Communications Commission and the United States of America
Florida Public Service Commission
GTE Service Corporation
H&R Block, Inc.
Information Industry Association
Information Technology Association of America
International Business Machines Corporation
Maryland People's Counsel
MCI Communications Corporation
Metromedia Paging Services
National Association of Regulatory Utility Commissioners
Newspaper Association of America
New York State Department of Public Service
North American Telecommunications Association
NYNEX Corporation
Pacific Telesis Group
Pennsylvania Office of Consumer Advocate

Pennsylvania Public Utility Commission
People of the State of California and the Public Utilities Commission of the State of California
Southwestern Bell Corporation
Southwestern Bell International Holdings Corporation
Southwestern Bell Publications, Inc.
Southwestern Bell Telecommunications, Inc.
Southwestern Bell Mobile Systems, Inc.
Sprint Communications Company
Telecom Corporation of New Zealand
United States Department of Justice
United States Telephone Association
U S WEST, Inc.
Voice-Tel Enterprises

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No. _____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The People of the State of California and the Public Utilities Commission of the State of California ("California") respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 18, 1994.

OPINION AND ORDER BELOW

The opinion of the Ninth Circuit is reported at *People of the State of California v. Federal Communications Commission*, No. 92-70083 (9th Cir. Oct. 18, 1994) ("*Califor-*

nia II"), and is reproduced in the Appendix, A1-34.[1] The order of the Federal Communications Commission, *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket 90-623, Report and Order (*"Order on Remand"*), is reported at 6 F.C.C. Rcd 7571 (1991), and is reproduced in the Appendix, B1-110.

JURISDICTION

The judgment of the Ninth Circuit was entered on October 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in the Appendix, C1-2.

STATEMENT OF THE CASE

1. Statement of Facts

The Communications Act of 1934 ("Act"), 47 U.S.C. § 151 *et seq.*, establishes a dual federal-state regulatory scheme governing the telephone network. Under this scheme, Congress has charged the Federal Communications Commission ("FCC") with regulating interstate services and facilities. Congress, however, expressly fenced off from FCC reach or regulation intrastate services and facilities, reserving authority over such matters to the states. 47 U.S.C. § 152(b).[2]

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[1] As herein used, numerals preceded by letters refer to page numbers in the appendix to this petition.

[2] 47 U.S.C. § 152(b) states in part that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with

In this case, the FCC has scaled the Section 152(b) fence by preempting state structural safeguards requiring a local telephone company to separate its marketing personnel or any of its facilities used in connection with intrastate "enhanced" services from marketing personnel or facilities used in connection with its intrastate and interstate basic monopoly telephone services.[3] Structural safeguards have long proven to be effective deterrents to improper cross-subsidization and discriminatory access by a local telephone company.[4] The FCC, however, has eliminated such safeguards for the company's interstate enhanced services, and instead has given the company sole discretion either to separate or integrate the marketing and other operations of its interstate enhanced services with the marketing and other operations of its interstate and intrastate basic monopoly services. Should the telephone company choose to integrate its provision of interstate enhanced and basic services, the FCC has prescribed a set of nonstructural safeguards to replace the structural ones, which the FCC believes allow the telephone company to be more efficient, and hence more

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respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." Section 152(b) is set forth in full in the Appendix, C1-2.

[3] Enhanced services use computerized data processing to convey information to users over the telephone network. Examples include voice mail and LEXIS.

[4] Structural safeguards require a company to separate in whole or in part its competitive services operations from its monopoly telephone services operations. Such safeguards prevent or deter the company from improperly deriving revenues from or shifting costs to captive ratepayers of basic monopoly telephone service in order to subsidize the company's competitive enhanced services. Structural safeguards also prevent or deter a local telephone company from gaining an unfair competitive edge by giving discriminatory access either to basic telephone transmission services or information about those services for its own enhanced offerings.

competitive in offering its enhanced services. [5] The federal framework is designed expressly to further the policy goals of Section 151 "to make available . . . a rapid, efficient Nationwide and world-wide wire and radio communication service." 47 U.S.C. § 151;[6] *California II, slip op.* at 12770, App. at A29.

In *California II*, the decision below, the FCC does not claim that state regulation applicable only to the intrastate portion of enhanced services negates the FCC's authority to promulgate accounting rules and other safeguards applicable to the interstate portion. Nor does the FCC claim that it is impossible for differing state and federal regulatory regimes to co-exist for interstate and intrastate enhanced services offered by a telephone company. *Id., slip op.* at 12774, App. at A33.[7] Indeed, the FCC has acknowledged that states could require a local telephone company to assign separate personnel to a separate corporate entity for the purpose of accounting for the company's intrastate enhanced services. *Id., slip op.* at 12772, App. at A31. The FCC nevertheless believes that a company's compliance with state regulations

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[5] In lieu of structural safeguards to prevent improper cross-subsidization and discriminatory access, the FCC has prescribed for interstate services accounting rules which apportion the costs between the telephone company's interstate basic and interstate enhanced services operations; rules known as "open network architecture" which provide competitors of enhanced services access to segregated or unbundled components of the local telephone company's network; and rules governing the disclosure of network and customer information.

[6] Section 151 is set forth in full in the Appendix, C1.

[7] In the decision below, neither the FCC nor its supporters disputed that it would be possible for a telephone company to assign separate personnel to market intrastate enhanced services on the one hand, and interstate enhanced and all basic services on the other. Nor did the FCC or its supporters dispute that it would be possible for a telephone company to reserve equipment exclusively for intrastate enhanced services.

requiring separate personnel for marketing the company's intrastate enhanced services or requiring the separation of any of its facilities for such intrastate services may be economically inefficient or practically burdensome to the company.[8] The FCC further assumes that any additional costs imposed by state regulation of intrastate services will be borne by the shareholders of the telephone company and not its ratepayers, notwithstanding that a state may determine otherwise. The FCC thus reasons that because a telephone company would opt to comply with state regulations for both its interstate and intrastate enhanced services, or perhaps not offer such services at all, state regulations would defeat the FCC's Section 151-derived policy of encouraging the telephone company to be more efficient and more competitive.

Accordingly, conceding that it is possible for dual federal-state regulation to exist, but solely to prevent frustration of its Section 151-derived policies, the FCC has preempted the states.

2. Proceedings Below

The FCC order challenged in the decision below stems from a remand of the FCC's *Computer III* orders by the Ninth Circuit in *California v. FCC*, 905 F.2d 1217, 1223 n.1 (9th Cir. 1990) (*"California I"*). In *California I*, the Ninth Circuit vacated and remanded the FCC's *Computer III*

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[8] In its brief before the Ninth Circuit, the FCC conceded that the argument that a local telephone company may not be able to identify the jurisdiction of one enhanced service, voice mail service, in order to route intrastate voice mail calls to separate equipment may be valid only "in some instances." Resp. Br. at 36. Moreover, the FCC did not dispute that the argument has no relevance to whether the company is able to assign separate personnel in order to market intrastate enhanced services. Finally, the FCC cannot dispute that customers today are required to deal with separate marketing personnel from two different companies for their intrastate services and interstate services.

orders on two grounds. First, it held that the FCC had acted arbitrarily and capriciously in removing structural separation requirements under which a local telephone company provided its interstate enhanced services. Second, it held that the FCC had exceeded its lawful authority in preempting the states from tariffing intrastate enhanced services offered by a local telephone company and from prescribing structural and other consumer safeguards governing the company's provision of intrastate enhanced services.

Relying on *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355(1986), and *Nat'l. Ass'n of Regul. Util. Comm'rs. v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) in overturning the FCC's preemptive rulings, the Ninth Circuit held that Section 152(b) fenced off from FCC reach not only intrastate basic telephone services, but also intrastate enhanced services offered by a local telephone company. *California I*, 905 F.2d at 1242. The Ninth Circuit also held that the FCC failed to demonstrate that state structural and other safeguards applicable only to the intrastate enhanced services of a local telephone company negated the exercise by the FCC of its own lawful authority over interstate services. *Id.* at 1243.

Following its defeat in *California I*, the FCC initiated a new proceeding in which it sought to reinstate the *Computer III* regulatory regime, including most of its preemptive rulings.[9] During the pendency of the remand proceeding, the FCC was presented with an order of the Georgia Public Service Commission ("Georgia") which found that BellSouth, the local telephone company, had engaged in marketing abuses and undue discrimination to the detriment of BellSouth's captive intrastate ratepayers and voice mail

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[9] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket 90-623, Notice of Proposed Rulemaking and Order, 6 F.C.C. Rcd 174 (1990).

competitors by offering its local voice mail services jointly with its regulated monopoly telephone services under federal nonstructural safeguards. *California II, slip op.* at 12765-12766 App. at A24-25.

The FCC did not dispute the findings of Georgia. Nevertheless, the FCC concluded in the *Order on Remand* that, even upon a state finding of compelling evidence of anticompetitive conduct, the FCC must preempt a state from requiring the local telephone company to structurally separate its marketing personnel or equipment for intrastate voice mail or other intrastate enhanced services from its marketing personnel or equipment for its interstate and intrastate monopoly telephone services. The FCC claimed that state regulation, although confined to intrastate services, would impose added costs on the telephone company, and hence thwart or impede the federal policy of encouraging telephone company efficiency and competitiveness. *Order on Remand*, 6 F.C.C. Rcd at 7574, 7630 ¶¶ 5, 121, App. at B5-6, 89-90.[10]

Thereafter, California and the New York Public Service Commission petitioned for review of the *Order on Remand.* Numerous other state parties intervened.

On October 18, 1994, the United States Court of Appeals for the Ninth Circuit vacated that portion of the FCC's *Order on Remand* in which the FCC replaced its structural separation requirements with nonstructural safeguards governing a telephone company's interstate services, but upheld that portion of the FCC's order which preempted the states from requiring certain structural and other safe-

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[10] Several local telephone companies, however, already offer their enhanced services through partially or fully separate corporate entities, with personnel and facilities separate and apart from personnel and facilities used in connection with the company's basic monopoly telephone services. 6 F.C.C. Rcd at 7616, ¶ 96, App. at B67-68.

guards governing a telephone company's intrastate enhanced services. *California II, slip op.* at 12775, App. at A34.

In its decision, the Ninth Circuit reiterated that "the only limitation on a state's authority over intrastate telephone service is 'when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication.'" *California II, slip op.* at 12771, App. at A30, *citing California I*, 905 F.2d at 1243. The Ninth Circuit referred to this limitation as the "impossibility exception" and reaffirmed that "the impossibility exception is narrow." *California II, slip op.* at 12771, App. at A30. The Ninth Circuit then concluded that the FCC had properly invoked this exception because the FCC determined that it would be more expensive, and hence "impossible," for the telephone company to comply with different federal and state safeguards governing interstate and intrastate services. *Id., slip op.* at 12773, App. at A32. Like the FCC, the Court assumed that a state would require the shareholders, not the ratepayers, of the local telephone company to bear the intrastate costs of state regulation.

The Ninth Circuit cited the *NCUC*[11] decisions of the Fourth Circuit as analogous. The Ninth Circuit explained that in those cases, the Fourth Circuit upheld federal preemption "[b]ecause the state regulations would effectively negate the FCC's regulation" promulgated under Sections 201-205 which "authoriz[ed] the use of customer provided equipment for interstate services." *Id., slip op.* at 12774, App. at A33. Here, however, unlike in the *NCUC* decisions and indeed contrary to those decisions, the Ninth Circuit has upheld federal preemption not because the state regulation would negate the FCC's ability to promulgate

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[11] *North Carol. Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*"NCUC I"*); *North Carol. Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*"NCUC II"*).

accounting and other regulations applicable to interstate services, but because state regulation, confined to intrastate services, would frustrate the FCC's Section 151-derived economic efficiency goals underlying such federal regulations. *Id., slip op.* at 12775, App. at A34. The Ninth Circuit's ruling thus elevates the FCC to a court of review of state regulation of intrastate service on issues of cost and efficiency.

This petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit has sanctioned a federal preemption standard that effectively allows the FCC to read the states out of the Communications Act any time the FCC believes that state regulation, confined to the intrastate sphere, will impose added costs or inefficiencies on the local telephone company, and hence will thwart or impede the policies contained in the general purpose language of Section 151 and underlying federal regulation in the interstate sphere. If allowed to stand, the decision below will nullify Congress' express reservation in Section 152(b) of authority to the states over facilities and services for or in connection with the intrastate portion of jurisdictionally mixed services.

The Ninth Circuit's decision also directly conflicts with *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), even though as a matter of law the two decisions are indistinguishable. In *Louisiana,* this Court held that the FCC may not "expand its power [into the intrastate domain] in the face of a congressional limitation on its jurisdiction" in order to "effectuate a federal policy" underlying FCC regulation in the interstate domain. 476 U.S. at 374. If allowed to stand, the decision below will effectively overrule *Louisiana.*

Finally, the Ninth Circuit's decision directly conflicts with the Fourth Circuit's *NCUC* decisions. In those decisions, the Fourth Circuit explicitly recognized that Congress intended the states to choose whether to avoid the economic and political costs to intrastate customers of requiring the local telephone company to comply with differing state regulations applicable only to the intrastate portion of the company's operations. In the decision below, the Ninth Circuit permits the FCC to oust the state from making that choice.

I

THE NINTH CIRCUIT HAS DECIDED A QUESTION OF FEDERAL LAW IN A WAY THAT DIRECTLY CONFLICTS WITH THE INTENT OF CONGRESS AND THE PREEMPTION DECISIONS OF THIS COURT

In *Louisiana*, the Court reaffirmed Congress' intent, in enacting Section 152(b) of the Communications Act, to erect a jurisdictional fence and to confine the FCC's exercise of authority to the interstate side of that fence. 476 U.S. at 370. The Court further reaffirmed Congress' intent that the FCC could not lawfully scale this fence and preempt state regulation otherwise confined to the intrastate side in order to "effectuate a federal policy" derived by the FCC from the general purpose language of Section 151 and underlying federal regulation on the interstate side. *Id.* at 374; *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515 n.12 (1989); *Cf. MCI Telecomms. Corp. v. AT&T*, 512 U.S. ____, 114 S.Ct. 2223, 2233 (1994) ("the Commission's desire 'to increase competition' cannot provide [it] authority to alter the well-established statutory . . . requirements.") (citation omitted).

In the decision below, the Ninth Circuit cites the FCC's reliance on the general purpose language of Sec-

tion 151 as a source of federal authority over interstate communication service and then concludes under that section that the FCC may override the express jurisdictional bar of Section 152(b) if the FCC demonstrates that "state regulation would negate valid FCC regulatory goals." *California II, slip op.* at 12770, 12771, App. at A29, 30. The decision thus thwarts congressional intent as reaffirmed in *Louisiana* by allowing the FCC to resurrect Section 151 as a basis upon which it may override Section 152(b).

As a matter of law, *Louisiana* and the decision below are indistinguishable. In both *Louisiana* and the decision below, the FCC had prescribed regulations, the objective of which was to further the goal of Section 151 by encouraging economic efficiency, and hence competitiveness by a telephone company in offering new services. *Louisiana*, 476 U.S. at 369, and *California II, slip op.* at 12756, App. at A15. Similarly, in both *Louisiana* and the decision below, the FCC acknowledged that it was possible for telephone companies to comply with both state and federal regulations. *Louisiana*, 476 U.S. at 375, and *California II, slip op.* at 12774, App. at A33. The FCC's sole argument in each case was that state regulation, although confined to the intrastate portion of dual-use facilities, must be preempted because such regulation would frustrate the FCC's Section 151-derived goals of efficiency and competitiveness underlying, respectively, its depreciation regulations and its nonstructural safeguards applicable to interstate services. *Louisiana*, 476 U.S. at 369, and *California II, slip op.* at 12775, App. at A34.

In *Louisiana*, this Court reversed the FCC order not because the FCC failed to demonstrate that state regulation would "frustrate the federal policy" and defeat the "whole purpose" underlying the federal regulation at issue there (the state arguably did both), but because the FCC failed to show that state regulation prevented the FCC from prescrib-

ing federal regulations governing interstate facilities. 476 U.S. at 369, 376.

In contrast, the decision below upholds the FCC order precisely and solely because the FCC believes that state regulation, concededly confined to intrastate services and facilities, would nevertheless frustrate the very same federal policy at issue in *Louisiana* (advancement of competition) and negate the goal or purpose underlying the FCC-prescribed safeguards governing interstate services. The decision below thus squarely conflicts with and effectively overrules *Louisiana* by allowing the FCC to "expand its power [into the intrastate domain] in the face of a congressional limitation on its jurisdiction" in order to achieve the Section 151-derived policy goals underlying federal regulation in the interstate domain.[12] *Louisiana*, 476 U.S. at 374; *Cf. MCI Telecomms. Corp. v. AT&T*, 114 S.Ct. at 2232.

II

THE COURT SHOULD REVIEW THIS CASE BECAUSE IT CREATES A CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL

The Ninth Circuit mistakenly believes that this case is distinguishable from *Louisiana* and analogous to cases from the Fourth Circuit cited by this Court in footnote four of that decision. 476 U.S. at 375 n.4, *citing NCUC* cases. In *Louisiana*, this Court observed that "where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation" and "state regulation would negate the federal tariff," the FCC could legitimately preempt the state regulation. *Id.* (emphasis in original).

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[12] California agrees with New York's petition filed herein which makes the same point.

In fact, the Ninth Circuit decision directly conflicts with the decisions from the Fourth Circuit by overlooking a critical distinction present in the *NCUC* cases which, unlike the decision below, maintains the integrity of the dual regulatory scheme of the Communications Act. In the *NCUC* cases, the state had prohibited customers from connecting phones not provided by the telephone company to the network. The FCC, however, permitted such interconnection, invoking its specifically delegated authority under Sections 201-205 of the Act. *NCUC I*, 537 F.2d at 792. Because the state chose to avoid the "economic and political costs of forcing the general consumer to buy two sets of terminal equipment," one for interstate use, and another for intrastate use, *NCUC II*, 552 F.2d at 1049, "[s]omething had to give" since a customer could not simultaneously comply with both federal and state regulations governing a single telephone. *Id.* at 1043. The Fourth Circuit upheld federal preemption because the state regulation rendered "nugatory" the specific "federal tariffs authorizing interconnection." *Id.*

Thus, in the *NCUC* cases, it was the *state*, by choosing not to force customers to have two telephones, that made it impossible "to separate the interstate and the intrastate components of the asserted FCC regulation." *Louisiana*, 476 U.S. at 375 n.4; *NCUC II*, 552 F.2d at 1049.[13] Had the state chosen instead to bear the "economic and political costs" of requiring customers to have two telephones, one for interstate use and another for intrastate use, then it would not have been impossible for customers to comply

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[13] The Fourth Circuit said that "the Commission's construction makes the term 'facilities' meaningless not because exclusively intrastate facilities cannot be built or imagined (indeed, some are already in existence), but because *state commissions prefer to avoid the economic and political costs* of forcing the general consumer to buy two sets of terminal equipment." *NCUC II*, 552 F.2d at 1049 (emphasis added).

with both federal and state regulations, and federal tariffs authorizing the interconnection of any telephone would not have been negated. *NCUC II*, 552 F.2d at 1049. The Fourth Circuit thus recognized that the state's choice created a situation of impossibility.

In contrast, the decision below allows the FCC unilaterally to define a situation of "impossibility" by taking away from the states the right expressly reserved by Congress to weigh the economic costs as well as benefits to intrastate ratepayers of requiring a local telephone company to comply with differing state regulations confined to the intrastate portion of its operations, and to determine whether to recover any such intrastate costs either from the telephone company or its ratepayers.[14] Having defined such a situation, the FCC then empowers itself to preempt the states from acting altogether, thereby "expand[ing] its power in the face of a congressional limitation on its jurisdiction." *Louisiana*, 476 U.S. at 374.

To be sure, had this preemption standard, at odds with the *NCUC* decisions, been applied in *Louisiana*, the states would have lost the case. In *Louisiana*, the FCC and telephone companies believed not only that differing state regulation would frustrate the "whole purpose" of federal regulation, *id.* at 376, and thwart the federal objectives underlying such regulation, *id.* at 363, 369, but that differing state regulation would imperil the economic well-being of the entire telecommunications industry. Specifically, it was argued that state depreciation rates, applicable to 75 percent of telephone company assets, would not allow the telephone companies to recoup some $26 billion in investment, thereby

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[14] Given that the costs of additional personnel or facilities for intrastate enhanced services are intrastate only, incurred only in the intrastate sphere and not accounted for on interstate ledgers, Congress has provided that the FCC may not properly intrude to determine whether such intrastate costs are reasonable. 47 U.S.C. § 152(b).

adversely affecting the economic ability of the telephone companies to provide services competitively. *Id.* at 359, 376. The telephone companies argued further that inconsistent state regulations governing their intrastate assets would place a "severe impact on the interstate communications network," *id.* at 373, "threaten[ ] the financial ability of the industry to achieve the technological progress and provide the quality of service that the Act was passed to promote," *id.* at 359, and "jeopardize the continued viability of the telecommunications industry," *id.* at 368, all in derogation of the congressional policy set forth in Section 151 of the Act.

The Court rejected all of these arguments of economic burden and economic irrationality as insufficient justification to preempt the states. Instead, in distinguishing the *NCUC* cases, the Court recognized first, that it was "certainly possible to apply different rates and methods of depreciation" to telephone equipment used jointly for interstate and intrastate services, *id.* at 375; second, and consistent with the *NCUC* cases, that Congress left it to the states to weigh, based on "principles, judgments and considerations" of public policy, the overall costs and benefits to the telephone company and its intrastate ratepayers of state regulation confined to intrastate services, *id.* at 376; and third, that "actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service in the other 'hemisphere.'" *Id.* at 360. Without deprecating the FCC's concerns, the Court then held that "§ 152(b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute." *Id.* at 376.

In contrast, the Ninth Circuit impermissibly allows the FCC to take matters into its own hands to achieve the objectives of Section 151 by giving preemptive weight to

similar, but less compelling, arguments of economic burden or irrationality caused by state regulation confined to the intrastate domain.[15] Specifically, the decision below sanctions federal preemption — notwithstanding that it is certainly possible for the telephone company to comply simultaneously with differing state and federal requirements for the company's enhanced services — whenever the FCC believes that compliance with state requirements would either be too costly or too burdensome for the company.[16] *Id.*, *slip op.* at 12774, A33. Thus, contrary to the *NCUC* cases and *Louisiana*, the FCC is allowed effectively to oust the states from weighing the costs and benefits of state regulation confined to intrastate services and facilities, including how to recover any intrastate costs, and to reduce

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[15] Contrary to the Ninth Circuit, the D.C. Circuit expressly recognized that state regulation cannot legitimately be preempted even if it "imposes too great an economic burden on carriers engaged in both interstate and intrastate communications" or is "economically irrational." *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990). In that case, the state was preempted because it directly set charges for an interstate service. *Id.* at 1516. This constitutes an additional conflict between circuits.

[16] In the decision below, the FCC never addresses the fact that its own regulations will permit or require inefficient duplication of telephone company personnel or facilities. The FCC has allowed the states to require the telephone company to assign separate personnel in a separate corporate entity for the purpose of accounting for the costs of intrastate enhanced services. *California II, slip op.* at 12772, App. at A31. The FCC has also conceded that federal safeguards governing access to customer information will require the telephone company to assign separate personnel for marketing interstate enhanced services on the one hand, and basic monopoly telephone services on the other, for customers with more than 20 lines or for any other customer who requests restricted access to such information. *Order on Remand*, 6 F.C.C. Rcd at 7609, 7610-11, ¶¶ 83,84 and n.155, App. at B57-58, 59-60. The FCC cannot rationally conclude that duplicative personnel or facilities is "uneconomic" and "impractical" to the local telephone company when its own regulations produce that result.

the states to regulating purely intrastate services and facilities, a result which "misrepresents the statutory scheme and the basis and test for pre-emption" which Congress prescribed. *Louisiana*, 476 U.S. at 374.[17]

To be sure, Congress did not draw a line beyond which the FCC could unilaterally conclude that the dual regulatory scheme is too expensive or cumbersome to the carriers.[18] If the economic or practical burden of the dual scheme becomes too great, the answer for the FCC is to return to Congress to rewrite the law, not for the FCC to confer authority upon itself. *Louisiana*, 476 U.S. at 376; *MCI Telecomms. Corp. v. AT&T*, 114 S.Ct. at 2232.

The decision below also upsets the balance of state and federal authority struck by Congress by improperly elevating the business judgment of the regulated local telephone company over the judgment of the state commission charged with regulating the intrastate operations of that company. *Order on Remand*, 6 F.C.C. Rcd at 7623, ¶ 108, App. at B79 (structural separation constitutes an "unnecessary government intrusion into business judgments by the BOCs regarding the most effective corporate organization for the provision of enhanced services."). The company's concern with efficiency, however, cannot legitimately override a state's concern in safeguarding the interests of the company's captive customers of intrastate services. Under the dual regulatory scheme, Congress did not leave it to the FCC and the regulated companies, but to the FCC and the states to determine within their respective regulatory

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[17] And even that reservation of authority to the states is illusory given the FCC's view that any facilities or services which interconnect with the national network are partly interstate. 6 F.C.C. Rcd at 7633, n.249, App. at B93.

[18] While no state would rationally impose costs which would drive a company out of business, any state order considered unduly burdensome by the company could be challenged in accordance with applicable law.

spheres whether the costs and benefits of particular federal and state regulations serve the public interest.

In the end, the logic of the preemption standard sanctioned by the Ninth Circuit permits no principled stopping point, and allows the FCC to dismantle the jurisdictional fence of Section 152(b) which Congress so carefully constructed.[19] If in order to justify preemption the FCC need only show that compliance with the dual regulatory scheme, which by definition imposes greater costs than a uniform scheme, is uneconomic or burdensome to the local telephone company, then nothing prevents the FCC from overriding any and all state regulations, otherwise confined to intrastate services, that differ from its own.[20] *Louisiana*, however, makes clear that the FCC may not act in an area over which Congress has explicitly denied it jurisdiction, where, as here, it is possible to separate the components of state and federal regulation. *Northwest Central*, 489 U.S. 493, 515 n.12., *citing Louisiana*, 476 U.S. at 374; *Cf. MCI Telecomms. Corp. v. AT&T*, 114 S.Ct. at 2232.

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[19] The FCC's acknowledgement that it has declined to preempt state rate-setting of intrastate enhanced services at this time because state action does not yet frustrate federal policy illustrates the FCC's potentially limitless reach under the flawed preemption standard endorsed by the Ninth Circuit. Resps. Br. at 101.

[20] At stake are a host of state measures designed to protect the interests of captive customers of intrastate services and which differ from federal measures. These include rules limiting pre-recorded telephone solicitations to intrastate subscribers (Section 2874 of the Cal. Pub. Util. Code), rules allowing intrastate residential subscribers the option of deleting access to messages which constitute harmful manner as defined by California law (Section 2884(b) of the Cal. Pub. Util. Code), and rules protecting captive ratepayers from funding the competitive ventures of the local telephone company.

CONCLUSION

California respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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